Supreme Court, U.S.
FILED
AUG 07 1994
OFFICE OF THE CLERK

No. 95-45

In The

Supreme Court of the United States

October Term, 1995

FRED L. PIRKLE and THERM-OMEGA-TECH, INC.,

Petitioners,

v.

OGONTZ CONTROLS COMPANY and THOMAS M. KENNY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF IN OPPOSITION

DOUGLAS L. OVERTOOM
Counsel of Record

LARRY L. TURNER
HOWARD J. BASHMAN
MONTGOMERY, MCCRACKEN, WALKER & RHOADS
Three Parkway – 20th Floor
Philadelphia, PA 19102
(215) 665-7200

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

41pp

QUESTIONS PRESENTED FOR REVIEW

I. Whether this is an appropriate case for this Court to decide if patent claim interpretation is a question of fact for a jury or a question of law for the court given that: (a) a jury, a district court judge and the Federal Circuit have interpreted the patent claims at issue in this case and found infringement, and (b) petitioners waived the argument that claim interpretation is a question of fact for the jury by arguing in both the trial court and on appeal to the Federal Circuit that claim interpretation is an issue of law to be decided by the court?

II. Whether the Seventh Amendment is satisfied by two jury trials regarding the issues of validity and infringement or whether that provision of the Constitution requires additional jury trials to be held until a verdict in petitioners' favor is obtained?

III. Whether this Court should grant certiorari to entertain petitioners' claim - which was rejected by the Federal Circuit in banc – that a panel of Federal Circuit judges used summary affirmance to avoid application of binding Federal Circuit precedent?

PARTIES TO THE PROCEEDINGS

The petitioners in this proceeding are Fred L. Pirkle and Therm-Omega-Tech, Inc.

Respondents are Ogontz Corporation (formerly Ogontz Controls Company) and Thomas M. Kenny. Pursuant to Rule 29.1, Ogontz Corporation states that it has no parent or subsidiary companies.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 2

SUMMARY OF THE ARGUMENT 8

ARGUMENT 10

I. THIS IS NOT AN APPROPRIATE CASE FOR THIS COURT TO DECIDE IF THE SEVENTH AMENDMENT REQUIRES QUESTIONS RELATING TO THE MEANING OF PATENT CLAIM TERMS TO BE SUBMITTED TO A JURY 10

A. This Is Not An Appropriate Case To Examine Whether The Judge Or The Jury Should Interpret The Claims Of A Patent Because Both Did So In This Case and Found Infringement 11

B. T-O-T Waived The Present Argument By Failing To Raise It Below 12

II. T-O-T'S REQUEST TO SET ASIDE THE JURY VERDICTS ON PATENT INFRINGEMENT AND ON THE AFFIRMATIVE DEFENSE OF PATENT INVALIDITY DO NOT WARRANT ADDITIONAL APPELLATE REVIEW BY THIS COURT 14

III. A COURT OF APPEALS IS NOT REQUIRED TO ISSUE A WRITTEN DECISION WHEN AFFIRMING A JUDGMENT OF A DISTRICT COURT .. 19

A. The Merits Panel Did Not Conspire To Use Federal Circuit Rule 36 To Avoid Application Of The *Markman* Decision 19

CONCLUSION 21

TABLE OF AUTHORITIES

Page

CASES

Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines Ltd., 369 U.S. 355 (1962) 15

Fraige v. American-National Watermattress Corp., 996 F.2d 295 (Fed. Cir. 1993) 17

Markman v. Westview Instruments, Inc., 52 F.3d 967 (Fed. Cir. 1995) (in banc), *petition for cert. filed*, 63 U.S.L.W. 2663 (U.S. Jul. 03, 1995) (No. 95-26) 9, 11, 12, 13, 19, 20

Structural Rubber Products Co. v. Park Rubber Co., 854 F.2d 1328 (Fed. Cir. 1988) 18

Structural Rubber Products Co. v. Park Rubber Co., 749 F.2d 707 (Fed. Cir. 1984) 17, 18

Structural Rubber Products Co. v. Park Rubber Co., 1986 WL 12326 (N.D. Ill. Oct. 24, 1986) 18

Taylor v. McKeithen, 407 U.S. 191 (1972) (per curiam) 19, 20

United States v. Baynes, 548 F.2d 481 (3d Cir. 1977) (per curiam) 19

Witco Chemical Corp. v. Peachtree Doors, Inc., 787 F.2d 1545 (Fed. Cir.), *cert. dismissed*, 479 U.S. 877 (1986) 15, 16, 17

Yakus v. United States, 321 U.S. 414 (1944) 14

No. 95-45

In The

Supreme Court of the United States

October Term, 1995

FRED L. PIRKLE and THERM-OMEGA-TECH, INC.,

Petitioners,

v.

OGONTZ CONTROLS COMPANY and THOMAS M. KENNY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF IN OPPOSITION

Respondents, Ogontz Corporation (formerly Ogontz Controls Company) and Thomas M. Kenny (collectively "Ogontz"), respectfully request that this Honorable Court deny the petition for a writ of certiorari to review the Judgment Order of the United States Court of Appeals for the Federal Circuit, which summarily affirmed, without opinion, the district court's final judgment.

STATEMENT OF THE CASE

In a Judgment Order entered April 6, 1995, *see* App. 1, a three-judge panel of the United States Court of Appeals for the Federal Circuit summarily affirmed, without opinion, the final judgment of the United States District Court for the Eastern District of Pennsylvania awarding $216,846.00 in favor of Ogontz in a patent infringement action brought against Fred L. Pirkle and Therm-Omega-Tech, Inc. *See* App. 3.

In their petition for a writ of certiorari, Fred L. Pirkle and Therm-Omega-Tech, Inc. (where appropriate collectively referred to as "T-O-T") seek review of the district court's final judgment of patent infringement. In addition, T-O-T requests in a footnote that the Federal Circuit's Judgment Order be vacated as to all "other issues" raised in T-O-T's appeal to the Federal Circuit. Petition at 22 n.13. These "other issues" are neither enumerated nor identified. *Id.*

The facts, viewed in the light most favorable to Ogontz, the verdict winner, are as follows.

Ogontz has designed and manufactured freeze protection devices for the railroad industry for over 40 years. (Rec.2284).[1] Ogontz was founded by Thomas J. Kenny, Sr. and is now run by his son, Thomas M. Kenny. (Rec.2283; 2288-89.)

In January 1979, Fred L. Pirkle was hired primarily as a salesperson for Ogontz. (Rec.3530, 3872-3873.) At that

---

[1] The appendix filed in the United States Court of Appeals for the Federal Circuit is cited herein as "Rec."

time Pirkle had some experience in mechanical engineering. (Rec.3530.) Pirkle entered into an "Employment Agreement" establishing his obligations to render and disclose to Ogontz all inventions or improvements made during his employment and to protect Ogontz' trade secrets. (Rec.3872-73.)

In 1981, Pirkle became Ogontz' Product Development Manager. As Product Development Manager, Pirkle's specific responsibility was to assist in the development of concepts and prototypes to be tested, engineered and produced by Ogontz. (Rec.5429.) Ogontz provided Pirkle with engineering and technical assistance, machine tools and a shop to use while working for Ogontz. *Id.* Pirkle set about to improve Ogontz' freeze protection line, including a valve known as the Harasewych valve. *Id.* During the winter of 1981-82, Pirkle told William J. Doyle, then Ogontz' Executive Vice President, that he had conceived a "revolutionary" idea to modify the Harasewych valve so as to provide a new snap-acting mechanism for freeze protection. (Rec.5430-5431.)

In May 1982, Ogontz, working in conjunction with its largest customer, Consolidated Rail Corporation ("Conrail") (Rec.2287), sponsored a "cold room" test for freeze protection valves. (Rec.5431; 2290-91.) During the cold-room test, Ogontz engineers developed two new valves by modifying existing Ogontz valves. These valves became known as the SA and LA valves. (Rec.5432; 2292-93.) Both the SA and the LA were used extensively by Conrail.

One evening after the cold-room test, Pirkle showed Ogontz' Vice President for Marketing and Sales, Norm

Cooper, a prototype of a modification to the Harasewych valve, described by Pirkle as a snap-acting valve. (Rec.5432-33.) Cooper asked Pirkle what he intended to do with the device. Pirkle told Cooper that he would not show it to Ogontz or Kenny "until he [Kenny] came around," because he did not want Kenny "to make any more money." (Rec.5433.) Pirkle also said that he would gain nothing by showing the prototype to Kenny. *Id.* The valve examined by Cooper was the MV-1, which Pirkle invented during his employment by Ogontz. (Rec.5440.)

On October 9, 1982, Pirkle's employment at Ogontz was terminated. Shortly thereafter, Pirkle patented and used the stolen MV-1 invention to start Controls Consulting Co., which later became T-O-T. (Rec.3531.) By November 1982, Pirkle was soliciting orders from Ogontz' leading customer, Conrail, for the MV-1 valve. (Rec.5434; 3531.) On December 8, 1982, Pirkle began selling the MV-1 valve to Conrail. *Id.* On January 25, 1983, Pirkle applied for a patent on the valve mechanism embodied by the MV-1. *Id.* United States Patent No. 4,460,007 (the '007 patent) issued from that application on July 17, 1984. (Rec.118; 4074.)

In May 1983, upon learning of Pirkle's theft of its intellectual property, Ogontz began integrating the technology that Pirkle had stolen into its own freeze protection products. (Rec.118; 3644.) Ogontz named the product the QR-E. (Rec.3644; 3682.) In September 1983, Ogontz filed suit against Pirkle in the Chester County, Pennsylvania, Court of Common Pleas for breach of contract and misappropriation of the MV-1. (Rec.119.) The Chester County court found that Ogontz was the sole and exclusive owner of the technology claimed in the '007 patent

and ordered Pirkle to assign the patent to Ogontz. (Rec.5420-24.) Three years of appeals in the state courts followed. (Rec.5398.) The state appellate courts rejected every legal argument pursued by Pirkle. (Rec.5391-98.) On September 5, 1990, the Pennsylvania Supreme Court denied Pirkle's Petition for Allowance of Appeal. (Rec.5398.) Thus, there exists a final, unreviewable and binding determination that Ogontz is the owner of the '007 patent and its subject matter.

The day after the state court judgment ordering T-O-T to remove the MV-1 valve from the market became final, T-O-T introduced the "Guru plug." (Rec.2457; 2302.) Ogontz then notified T-O-T that the Guru plug also infringed the '007. (Rec.2306.)

The case now before this Court was initiated by T-O-T in an attempt to subvert Ogontz' successful litigation in the state court system. T-O-T's federal suit, along with asserting a host of other groundless causes of action, disputed ownership of United States Patent Nos. 4,460,007 and 4,878,512 (the '512 patent)[2] and the subject matter of those patents. (Rec.17-36; 37-46; 2047.) The '512 patent is a "continuation" of the application which issued as the '007 patent and therefore claims the same invention, or "subject matter," as the '007 patent. (Rec.2308; 4212 *et seq.*)

In July 1992, the district court granted Ogontz' motion for summary judgment on all of T-O-T's claims except for certain tort claims based on communications

---

[2] Ownership of the '512 patent had not been at issue in the state court litigation.

that Ogontz made informing customers and potential customers of Ogontz' rights to the inventions and patents in question and the progress of Ogontz' efforts through the courts to enforce its rights. (Rec.17-36; 37-46.) The district court denied Ogontz' motion as to these claims out of an "abundance of caution" (Rec.2050) to give T-O-T an additional opportunity to produce evidence in support of its allegations. (Rec.2050-51.)

The first of two jury trials began on November 15, 1993 on T-O-T's remaining tort claims, Ogontz' patent infringement counterclaims, and T-O-T's affirmative defenses to those counterclaims. The district court held the evidence produced at trial "insufficient for a reasonable jury to find a violation . . . under Pennsylvania law" (Rec.2047) on T-O-T's tort claims because Ogontz' letters were "essentially true" (Rec.2051) and Ogontz had "a privilege to advise competitors and persons who might deal in that property of [Ogontz'] interests." (Rec.2047.)

The jury returned a verdict in favor of Ogontz rejecting T-O-T's affirmative defenses of patent validity and enforceability. (Rec.5546-47; 5551.) The jury also awarded damages to Ogontz for T-O-T's infringement of the '007 patent through the sale of the MV-1 valve. (Rec.5548.) The jury was deadlocked as to the question of literal infringement by T-O-T's Guru plugs. (Rec.5549-50; 5552-53.)

The retrial on the issue of infringement by T-O-T's Guru plugs commenced on April 11, 1994. On April 28, 1994, the jury found that the 4H-R Guru plug in both the "T" and "PAK" configurations, the 4H Guru plug in the "PAK" configuration and the original Guru plug in the "PAK" configuration all infringed claims 4, 9 and 10 of

the '007 patent. (Rec.5555-57.) The jury also awarded Ogontz damages for its lost profits due to the infringement of the '007 patent by T-O-T. *Id.*

The trial court denied T-O-T's post-trial renewal of its motions for judgment as a matter of law and for a new trial. (Rec.16.) Thereafter, T-O-T appealed to the United States Court of Appeals for the Federal Circuit.

In its opening brief on appeal to the Federal Circuit, T-O-T raised eight separate issues. Except for the cryptic and oblique reference to "other issues" on page 22 of the present petition, T-O-T has in this Court abandoned all but one of those issues. Of the three questions presented in the petition before this Court, only Question Two was among the questions presented for review to the Federal Circuit.[3]

On April 5, 1995, a three-judge panel of the United States Court of Appeals for the Federal Circuit heard oral argument in the appeal. The Federal Circuit allocated 15 minutes of argument time per side, and during the argument the panel granted additional time to counsel for both sides.

On April 6, 1995, the Federal Circuit entered a judgment order affirming, in its entirety, the district court's final judgment. *See* App. 1. The judgment order states, in relevant part:

---

[3] Petitioners worded the first question presented to this Court to give the appearance that they had raised it below; however, in truth they argued the opposite position from the position they now espouse.

> This CAUSE having been heard and considered it is ORDERED and ADJUDGED: AFFIRMED.

Id.

On April 20, 1995, T-O-T filed a petition for rehearing and suggestion for rehearing in banc. The Federal Circuit ordered Ogontz to file an answer to the petition for rehearing together with a sufficient number of copies of the answer to permit its distribution to the entire in banc court. A copy of Ogontz' answer to the petition for rehearing is set forth in the appendix to this brief in opposition. *See* Resp. App. 1-15.

In an order dated May 24, 1995, the Federal Circuit denied T-O-T's petition for rehearing and declined its suggestion for rehearing in banc. *See* App. at 49-50. On May 30, 1995, T-O-T filed in the Federal Circuit a motion seeking a stay of that court's mandate. On June 1, 1995, Ogontz filed a response opposing the motion for a stay. On June 12, 1995, the Federal Circuit issued an order denying T-O-T's motion for a stay of the mandate. The Federal Circuit's mandate issued on June 19, 1995.

On July 6, 1995, T-O-T filed its petition for a writ of certiorari in this Court.

SUMMARY OF THE ARGUMENT

This Honorable Court should deny T-O-T's petition for a writ of certiorari.

With respect to the first question presented by petitioners, whether the Seventh Amendment requires claim

interpretation to be submitted as a question of fact to the jury or to be determined as a matter of law by the court, this is not an appropriate case to examine this question for two reasons. First, the question is moot because here both a jury and judges exercising de novo review have concluded that T-O-T is liable for patent infringement. Second, petitioners did not argue on appeal to the Federal Circuit or in their post trial motions that the Seventh Amendment requires the issue of claim interpretation to be submitted to the jury, but rather argued that claim interpretation is a matter of law subject to de novo review by the court on appeal. It was only after the Federal Circuit Court of Appeals subjected the claims to de novo review and affirmed the judgment of the district court that petitioners, then realizing they had lost under both standards, seized upon their current argument. Petitioners have waived their current argument not only by failing to raise it at the appropriate time below, but also by actively arguing against it.

With respect to petitioners' second question involving the scope of the Seventh Amendment, the Seventh Amendment does not require that issues of infringement and validity be decided by the same jury because those issues are not indistinguishably interwoven; rather, they are separate and distinct considerations that may be decided separately by different juries. Moreover, this is no longer a question of importance because the Federal Circuit in its recent in banc ruling in *Markman v. Westview Instruments, Inc.*, 52 F.3d 967 (Fed. Cir. 1995) (in banc), *petition for cert. filed*, 63 U.S.L.W. 2663 (U.S. Jul. 03, 1995) (No. 95-26), held that the court, and not the jury, should decide the meaning of a patent claim as a matter of law. Thus, there is no risk today that two juries

might come to differing conclusions as to the meaning of a single patent claim. Therefore, this question will not arise again in the future.

Petitioners' third question for review regarding the Federal Circuit's failure to produce a written opinion regarding its decision subjects this Court to argument unsupported by rule, case or statute. Contrary to petitioners argument, a court of appeals is not required to render a written opinion whenever it affirms a district court's judgment. Indeed, this question has already been answered by this Court. The answer is no.

ARGUMENT

I. THIS IS NOT AN APPROPRIATE CASE FOR THIS COURT TO DECIDE IF THE SEVENTH AMENDMENT REQUIRES QUESTIONS RELATING TO THE MEANING OF PATENT CLAIM TERMS TO BE SUBMITTED TO A JURY

T-O-T contends in its first question presented for review that the Seventh Amendment requires that questions regarding the meaning of patent claim terms must be submitted to the jury when extrinsic evidence raises a genuine dispute concerning the meaning of those terms. T-O-T further argues that there is "no patent-related issue of greater national importance or pervasive effect than the issue presented by this case concerning the command of the Seventh Amendment regarding the proper roles of judge and jury vis-à-vis patent claim interpretation." Petition at 9. T-O-T's argument, however, is moot and irrelevant because both a jury, a district court judge, and the

Federal Circuit have interpreted the patent claims at issue and have all come to the conclusion that the patent in question is infringed by T-O-T's Guru plugs. They all concluded that a finding of infringement was warranted. Moreover, T-O-T argued in its post trial motions and on appeal to the Federal Circuit that claim interpretation presents a question of law for the court to decide. T-O-T waived any argument to the contrary by failing to advance it below.

A. This Is Not An Appropriate Case For This Court To Examine Whether The Judge Or The Jury Should Interpret The Claims Of A Patent Because Both Did So In This Case And Found Infringement

The judgment entered by the district court in this case must stand whether it is believed that a judge or a jury, or a combination of both, should determine the meaning of patent claims.

Here, the jury interpreted the patent claims in this case and found that T-O-T infringed the '007 patent. Therefore, Ogontz' victory would not be affected if patent claim interpretation is a jury question.

On the other hand, if patent claim interpretation is a matter of law exclusively for the court and subject to de novo review, as the Federal Circuit's in banc decision in *Markman v. Westview Instruments, Inc.*, 52 F.3d 967 (Fed. Cir. 1995) (in banc), *petition for cert. filed*, 63 U.S.L.W. 2663 (U.S. Jul. 03, 1995) (No. 95-26), states, again Ogontz' victory remains unaffected. Here, both the district court and the court of appeals have reviewed and interpreted

the claims and found that the language of the claims, as construed by them, supports as a matter of law the jury's finding of infringement. *See* App. at 1 and 49-50. Therefore, Ogontz' victory would not be affected if claim interpretation is a question of law.

The present petition is an argument for review of *Markman*, not the case at hand. As Ogontz has shown, however, no matter what disposition is made of the petition for certiorari filed in *Markman*, Ogontz' victory over T-O-T will not be affected.

In this suit, a jury, a district court judge and a merits panel of the Federal Circuit have interpreted the patent claims at issue and concluded that those claims are infringed by T-O-T's products. At some point petitioners must accept defeat.

B. T-O-T Waived The Present Argument By Failing To Raise It Below

On post trial motions before the district court and on motions before the court of appeals, T-O-T argued that claim construction is a question of law for the court. *See, e.g.*, Counterclaim Defendants' Post-Trial Renewal of Their Motion For Judgment as a Matter of Law On The Counterclaim In Civil Action No. 86-3374, Or In The Alternative, Motion For a New Trial, at 4; Brief for Appellants at 33; Appellants Petition for Rehearing at 2. T-O-T argued to the Federal Circuit panel that patent claim construction was a matter of law, and that the issue would soon be decided by the Federal Circuit in banc in

Markman.[4] *Id.* The decision in *Markman* was released on April 5, 1995, the day *before* the Federal Circuit ruled on T-O-T's appeal.

After the *Markman* decision was released, holding (as T-O-T had argued) that claim interpretation was a matter of law, T-O-T moved for a rehearing in banc of the present case by the Federal Circuit. The principal support for its arguments was the decision in *Markman*, which T-O-T hailed as a vindication of its position that claim interpretation is a question of law. T-O-T argued that its loss on appeal before the merits panel was obviously the result of a clerical error or a conspiracy between the Judges on the panel to ignore the decision in *Markman* and implement their own personal view of what the law should be. Appellants' Petition for Rehearing at 3 and 6. Ogontz explained in its answer to T-O-T's petition for rehearing that, in accordance with *Markman*, the panel had properly exercised its "power and obligation to construe as a matter of law the meaning of language used in the patent claim." Answer to Petition for Rehearing at 4, quoting *Markman*, 52 F.3d at 979. The active judges of the Federal Circuit rejected T-O-T's arguments by rejecting T-O-T's suggestion for rehearing in banc.

Now, after its arguments were rejected by the entire Federal Circuit, T-O-T attempts to argue a position completely contrary to what it has argued to this point. For the first time, T-O-T argues that the Seventh Amendment

---

[4] Similarly, T-O-T also argued before the district court in its post trial motions that patent claim construction was a matter of law.

requires a jury to interpret patent claims when extrinsic evidence raises a dispute concerning their meaning.

Under the decisional law of this Court, T-O-T has forever waived the right to request a jury to interpret the patent claims of the '007 patent, or to raise that issue before this Court. In *Yakus v. United States*, 321 U.S. 414, 444 (1944), this Court stated that "[n]o procedural principal is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." In this case, T-O-T not only failed to assert the right it now attempts to argue, but it affirmatively argued against the very existence of that right.

In light of the foregoing, this Court should not consider T-O-T's argument that the Seventh Amendment requires a jury to interpret the meaning of patent claims where extrinsic evidence exists. Not only is T-O-T's argument disingenuous in light of its arguments before the district court and Federal Circuit, but it must also be considered waived by T-O-T's failure to raise it at any prior time during the appeal.

For all these reasons, this Court should reject T-O-T's first ground for certiorari.

II. T-O-T'S REQUEST TO SET ASIDE THE JURY VERDICTS ON PATENT INFRINGEMENT AND ON THE AFFIRMATIVE DEFENSE OF PATENT INVALIDITY DO NOT WARRANT ADDITIONAL APPELLATE REVIEW BY THIS COURT

T-O-T also requests this Honorable Court to grant its petition for a writ of certiorari based upon its argument

that the issues of patent validity and infringement were allegedly inextricably intertwined and should have been tried before the same jury. T-O-T argues that the jury verdicts against it should not stand under the "no reexamination of facts" clause of the Seventh Amendment.[5] Petition at 15. However, T-O-T offers no legitimate reason for setting aside the jury verdicts on the issues of validity and infringement, which were entered upon full and fair jury trials.

Contrary to T-O-T's argument, Ogontz' rights under the Seventh Amendment would be violated by setting aside the jury verdicts. Unless there is an unavoidable factual basis for concluding that inconsistent verdicts have been reached, the Seventh Amendment commands that the courts must presume that there is no inconsistency. *See, e.g., Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines Ltd.*, 369 U.S. 355, 364 (1962) (where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way).

Here, there is no inconsistency between the jury verdicts. T-O-T has offered nothing but speculation that the second jury verdict might be inconsistent with the first. T-O-T's claim that the Federal Circuit's opinion in *Witco*

---

[5] T-O-T admitted in its petition for rehearing to the Federal Circuit that "the *Markham* [sic] decision attenuates the constitutional magnitude of the error" that allegedly resulted from having different juries return verdicts on validity and infringement. Petition for Rehearing at 8. Indeed, under *Markman* claim interpretation is not even a function of the jury. Therefore, T-O-T's second question will never arise again, and there is consequently no need for this Court to spend its limited judicial resources reviewing the issue.

Chemical Corp. v. Peachtree Doors, Inc., 787 F.2d 1545 (Fed. Cir.), *cert. dismissed*, 479 U.S. 877 (1986), supports its position was considered and rejected by the Federal Circuit.[6]

Moreover, to the extent that the Federal Circuit in *Witco* expressed any views as to the interconnectedness of the issues of an invalidity defense and claim construction, its reasoning was clearly and carefully restricted to the record in that case. The Federal Circuit simply refused to construe *Witco* as a sweeping edict that these issues may never properly be decided by separate juries.[7]

---

[6] The actual holding of *Witco* was that the trial court abused its discretion when it coerced a deadlocked jury into reaching a verdict on infringement. *See* 787 F.2d at 1548-49. This clearly did not occur in the present case. Here the district court was exceedingly sensitive to the jury's important role, and excused the first jury – without objection by either party – after only one day of deliberations. Before concluding its deliberations the first jury reached a verdict, by special interrogatories, on the affirmative defenses of validity and unenforceability. (Rec. 5546-47; 5551; 2053-54.) As explained above, the Seventh Amendment does not permit this verdict to be set aside absent compelling evidence that it was erroneous. Such evidence is lacking here.

[7] The actual language of the *Witco* opinion reads:

> Furthermore, it is inappropriate, *in light of the evidence presented and arguments made at this trial*, to have one jury return a verdict on the validity, enforceability and contract questions while leaving the infringement questions to a second jury. We reached this conclusion only after considering *the totality of the circumstances* and by answering, "How may the ends of justice be served?" [Citations omitted] . . . *Here* the arguments against infringement are indistinguishably woven with the factual underpinnings of the

It is well-settled within the Federal Circuit that the issues of validity and infringement may be decided by separate juries. For example, in *Fraige v. American-National Watermattress Corp.*, 996 F.2d 295 (Fed. Cir. 1993), a jury returned special verdicts finding infringement and invalidity due to anticipation and obviousness. The appeals court left the special verdict on infringement intact, but remanded for a new trial limited to the issue of validity, thus requiring two different juries to consider the issues of infringement and validity. *Fraige*, 996 F.2d at 300.

In *Structural Rubber Products Co. v. Park Rubber Co.*, 749 F.2d 707, 720 (Fed. Cir. 1984), the Federal Circuit, discussing the Seventh Amendment, noted that "[t]o aid comprehension, complex cases have been tried a step at a time, receiving the jury's answer to one phase of a case, and only then continuing to the next." The court reiterated its holding that a trial court "may ask for a general answer on one or more specific legal issues." *Structural Rubber*, 749 F.2d at 720. In the initial *Structural Rubber* trial, a jury found that devices made by Park Rubber Co. infringed Structural's patents but that the patents themselves were invalid. On appeal the Federal Circuit reversed the judgment as to invalidity only and

---

validity and enforceability determinations and the subject matter of the contract.

787 F.2d at 1549 (emphasis added).

Certainly in this case, where the district court and the Federal Circuit agree completely with the jury's findings that the '007 patent is both infringed and not invalid, the "ends of justice" are best served by denying review of T-O-T's second ground for certiorari. (Rec.11; 5546-47.)

remanded for further proceedings. *Structural Rubber,* 749 F.2d at 724. A second jury trial was held limited to the issue of invalidity. *Structural Rubber Products Co. v. Park Rubber Co.,* 1986 WL 12326 (N.D. Ill. Oct. 24, 1986). At the second trial the new jury found the patent claims valid and the trial court granted Structural's request for a permanent injunction against Park. The Federal Circuit affirmed the judgment following the second trial without published opinion. *Structural Rubber Products Co. v. Park Rubber Co.,* 854 F.2d 1328 (Fed. Cir. 1988). Thus, it is clear that validity and infringement may be considered by two different juries.

Because the only authorities identified by T-O-T are limited to determinations made upon the specific arguments and evidence presented at the trial of other cases; because T-O-T has identified no evidence or argument presented at the trial of *this case* that would justify setting aside the jury verdict at issue here; because the verdict on validity was reached on special interrogatories pursuant to Federal Rule of Civil Procedure 49; because the verdicts are in no way inconsistent with each other; because the trial judge, who heard the evidence at both trials, reviewed the verdicts on post trial motions; because the merits panel of the Federal Circuit made a de novo review of the patent claims and affirmed the judgment of the trial court; because the Federal Circuit considered and rejected the present argument in its refusal to grant rehearing in banc; and because the Seventh Amendment requires that the verdicts be retained unless it is virtually impossible to make sense of the verdicts as returned, the rational answer in this case to the question "how may the

ends of justice be served" is to deny T-O-T's second ground for certiorari.

III. A COURT OF APPEALS IS NOT REQUIRED TO ISSUE A WRITTEN DECISION WHEN AFFIRMING A JUDGMENT OF A DISTRICT COURT

A. The Merits Panel Did Not Conspire To Use Federal Circuit Rule 36 To Avoid Application Of The *Markman* Decision

In the third question presented for review, T-O-T asks this Court to hold that the entry of a summary affirmance of the trial court's judgment "denies the appellants their statutorily granted right of appeal." Petition at i. T-O-T further argues, in essence, that the use of Federal Circuit Rule 36 by the judges implies that the judges of the United States Federal Circuit Court are involved in a conspiracy against T-O-T.

T-O-T's argument mistakes the absence of a written decision for a lack of appellate review. The use of a judgment order does not indicate that an appeal is receiving less than close appellate scrutiny. *See Taylor v. McKeithen*, 407 U.S. 191, 194 n. 4 (1972) (per curiam); *United States v. Baynes*, 548 F.2d 481, 482-84 (3d Cir. 1977) (per curiam) (rejecting due process challenge to the affirmance of a criminal conviction by judgment order).

The Honorable Judges Pauline Newman and Randall Rader and Senior Judge Byron Skelton read and considered briefs totaling over 125 pages. They gave each party a full opportunity to argue the issues raised on appeal.

Indeed, each party was given extra time for oral argument. Based on the briefs and arguments, the Panel determined that T-O-T's appeal was without merit.

The appellate review T-O-T received from the Federal Circuit did not end with the three-judge panel assigned to their appeal. T-O-T filed a petition for rehearing and suggestion for rehearing in banc. The Federal Circuit ordered Ogontz to file an answer for distribution to the entire in banc court. After reviewing T-O-T's petition and Ogontz' answer thereto, none of the fourteen active judges on the Federal Circuit noted his or her dissent from the denial of rehearing in banc. *See* App. 49-50. Indeed, if any of the other judges of the Federal Circuit had believed the merits panel had used Federal Circuit Rule 36 to avoid application of the *Markman* decision, they certainly would have voted to rehear the appeal in banc. Their refusal to do so clearly illustrates that they believed the panel properly applied the precedents of the Federal Circuit.[8] While T-O-T is no doubt disappointed with the outcome of its appeal, the appeal received sufficient appellate review.

The rule of law that T-O-T seeks this Court to announce is contrary to this Court's decisions and has no basis in reason. For example, in *Taylor*, 407 U.S. at 194 n.4, this Court stated that:

> We, of course, agree that the courts of appeals should have wide latitude in their decisions of

---

[8] For additional explanation of this point, see Answer of Appellees to Appellants' Petition for Rehearing In Banc. Resp. App. at 1-15.

whether or how to write opinions. That is especially true with respect to summary affirmances.

The consequences of the rule T-O-T would have the Court adopt would be far-ranging. The courts of appeal would be required to issue written decisions on every appeal, wasting limited and precious judicial resources on cases the panel finds unworthy of special note.

For these reasons, this Court should reject T-O-T's third ground for certiorari.

CONCLUSION

For the foregoing reasons, Ogontz respectfully requests that this Court deny the petition for a writ of certiorari.

Respectfully submitted,

DOUGLAS L. OVERTOOM
Counsel of Record

LARRY L. TURNER
HOWARD J. BASHMAN
MONTGOMERY, MCCRACKEN,
WALKER & RHOADS
Three Parkway – 20th Floor
Philadelphia, PA 19102
(215) 665-7200

Counsel for Respondents

ANSWER OF APPELLEES TO APPELLANTS' PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING IN BANC

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Appeal No. 94-1454

FRED L. PIRKLE and
THERM-OMEGA-TECH, INC.,

Plaintiffs-Appellants,

v.

OGONTZ CONTROLS COMPANY
and THOMAS M. KENNY,

Defendants-Appellees.

Appeal from decisions of the United States District Court for the Eastern District of Pennsylvania, in Civil Action Nos. 86-3374 and 90-2430, entered May 19, 1994, July 8, 1994 and July 28, 1994, Hon. Clifford Scott Green, Senior District Judge

---

Douglas L. Overtoom
Montgomery, McCracken,
Walker & Rhoads
Three Parkway, 20th Floor
Philadelphia, PA 19102

Attorney for Appellees

Larry L. Turner
Howard J. Bashman
OF COUNSEL

UNITED STATES COURT OF APPEALS FOR THE FEDERAL COURT

Pirkle v. Ogontz Controls

No. 94-1454

CERTIFICATE OF INTEREST

Counsel for the appellee, Ogontz Corporation (formerly Ogontz Controls) and Thomas M. Kenny, certifies the following:

1. The full name of every party or amicus represented by me is:

(a) Ogontz Corporation
(b) Thomas M. Kenny

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

N/A

3. The parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates that have issued shares to the public, of the party or amicus curiae represented by me are:

None (see also attached disclosure statement).

4. The names of all law firms and partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:

(a) Montgomery, McCracken, Walker & Rhoads:

(i) David H. Marion, Esquire
(ii) Robert E. Welsh, Jr., Esquire

(iii) Larry L. Turner, Esquire
(iv) Stephen D. Ellis, Esquire
(v) Douglas L. Overtoom, Esquire

(b) Woodcock, Washburn, Kurtz, Mackiewicz & Norris:

(i) Norman L. Norris, Esquire
(ii) Dale Heist, Esquire

(c) Reed, Smith, Shaw & McClay:

(i) Robert C. Podwil, Esquire

8-23-94
Date

/s/ Douglas L. Overtoom
Douglas L. Overtoom
MONTGOMERY,
McCRACKEN, WALKER
& RHOADS
Three Parkway, 20th Floor
Philadelphia, PA 19102
(215) 665-7200

Counsel for Appellee

TABLE OF CONTENTS

PAGE

CERTIFICATE OF INTEREST i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

I. INTRODUCTION 1

II. ARGUMENT 3

A. A Rehearing On The Affirmance Of The Judgment Of Patent Infringement is not Appropriate 3

B. Appellants' Antitrust and State Law Arguments have been Argued and Reargued and are not the Proper Subject for Rehearing .. 7

C. An In Banc Rehearing Of Appellants' State Law Claims Would Be Wasteful Of Valuable Judicial Resources 10

III. CONCLUSION 11

TABLE OF AUTHORITIES

PAGE

CASES

Atari Games Corp. v. Nintendo of America, Inc.,
897 F.2d 1572 (Fed. Cir. 1990).....9

Genentech, Inc. v. Eli Lilly and Co.,
998 F.2d 931, 944 (Fed. Cir.),
cert. denied, 114 S. Ct. 1126 (1993).....7

Markham v. Westview Instruments, Inc.,
No. 92-1049, 1995 WL 146983 (Fed.
Cir. Apr. 5, 1995) (in banc) 3-7

Professional Real Estate
Investors v. Colombia Pictures,
113 S. Ct. 1920 (1993).....9-10

OTHER AUTHORITIES

Fed. R. App. P. 40(a) 8

Internal Operating Procedures
Information Sheet (Fed. Cir.) 2, 3, 8, 9

Internal Operating Procedures 9.3.3 (3d Cir.).....11

I. INTRODUCTION

This Court should deny Appellants' Petition For Rehearing And Suggestion For Rehearing in Banc because: 1) appellants have produced absolutely no evidence that the panel overlooked or misapprehended any point of law or fact on appeal; 2) appellants are merely rearguing points made and lost before the Federal Circuit and the District Court for the Eastern District of Pennsylvania; and 3) the Federal Circuit has no interest in making in banc decisions concerning Pennsylvania law.

During the course of this litigation appellants Term-Omega-Tech and Fred L. Pirkle (hereinafter collectively "T-O-T") have accused both judges and officers of the courts involved in this matter with fraud,[1] collusion,[2] and incompetence.[3]

True to form, T-O-T now impugns the integrity of Circuit Judges Newman and Rader and Senior Circuit Judge Skelton by suggesting that they entered the judgment order in this matter in derogation of their duty as

---

[1] T-O-T argued that counsel for Ogontz defrauded the Pennsylvania courts. That contention was completely and correctly rejected by the district court. *See, e.g.*, Joint Appendix at A.27-28.

[2] Counsel for T-O-T stated to the district court on the record that Ogontz only won in the state court proceedings because Ogontz' attorney "had it in with the Judge." *See* Joint Appendix at A.959-60.

[3] T-O-T's suggestion that the judgment order issued by the Federal Circuit in this appeal was entered due to a clerical mistake is insulting, incredible and not worthy of further comment. *See* Appellants' Petition for Rehearing With Suggestion For Rehearing In Banc at 3.

appellate judges to make "difficult or troublesome decisions," or, worse, to deliberately conceal divisive or disturbing issues. *See* Appellants' Petition for Rehearing With Suggestion For Rehearing In Banc at 6-7 n.1. While any litigant with ink and paper has the ability to suggest that three distinguished Circuit Judges of this Court improperly used a judgment order to "conceal divisive or disturbing issues," *id.*, the petition for rehearing falls far short of substantiating such a grave assertion.

A three judge merits panel of the Federal Circuit will enter a judgment of affirmance without opinion only when they unanimously agree that "the appellants have utterly failed to raise any issues in the appeal that require an opinion to be written in support of the court's judgment of affirmance." Internal Operating Procedures Information Sheet provided by the Court to the parties upon mailing of the judgment order (hereinafter "I.O.P. Information Sheet"). In spite of the fact that T-O-T unquestionably failed to persuade any member of the panel that any of the eight separate issues raised on appeal had merit, T-O-T ignores the Federal Circuit's admonition that "petitions for rehearing are rarely considered meritorious," *id.*, and disregards the Court's instructions *not to reargue matters already considered* by the panel. *Id.* Instead, T-O-T demands yet another bite of an apple it has already gnawed to the core.

II. ARGUMENT

A. A Rehearing On The Affirmance Of The Judgment Of Patent Infringement is not Appropriate.

A rehearing on the affirmance of the judgment of patent infringement is not appropriate. All of appellants' present arguments were addressed in the briefs and/or discussed at oral argument. Nor is the distinguished panel guilty of "hiding the ball" by its use of a judgment order.

On the same day that this appeal was argued before the panel, this Court released an in banc decision holding that claim construction was a matter of law subject to de novo review on appeal. *Markham v. Westview Instruments, Inc.*, No. 92-1049, 1995 WL 146983 (Fed. Cir. Apr. 5, 1995) (in banc). It was thus clear at the time the panel heard oral argument and issued its affirmance of the judgment in this matter that claim construction is a matter of law subject to de novo review. *Id.*

Appellants' argument seems to be based upon the assumption that the panel was unaware of the *Markham* opinion, or in a conspiracy not to apply the holding of that decision, or misunderstood *Markham's* holding. Such a position is insupportable. Appellants fully briefed the line of cases supporting the *Markham* decision, and the panel inquired about the issue of de novo review during oral argument. *See* Brief of Appellants at 32-45. In fact, appellants' counsel admits that he expressly reminded the panel of the in banc consideration of *Markham* and instructed the panel that "the *Markham* in banc decision

would control." Appellants' Petition For Rehearing With Suggestion For Rehearing In Banc at 2. It is disingenuous of appellants to complain that the panel overlooked or misapprehended the holding of *Markham* or its power to conduct de novo review of a patent's claim language. If anything, the judges were more keenly aware and more sharply focused on the requirements established by *Markham*.

Under *Markham*, the panel in the present appeal had the "power and the obligation to construe as a matter of law the meaning of the language used in the patent claims," *Markham*, WL 146983 at *11. There is no evidence to indicate that the panel failed to carry out its duty. The panel apparently did reexamine and re-construe the claims and agreed with the previous findings of the jury and the district court that T-O-T's devices infringe claims 4, 9 and 10 of Ogontz' '007 patent. Thus, three separate evaluations, by a jury, a district court judge and a merits panel of the Federal Circuit, have now concluded that the patent claims at issue are infringed by T-O-T's products. At some point appellants must accept defeat..

The panel reached its conclusions after examining the materials submitted for review by the parties, and questioning counsel for both parties about those materials at oral argument. In the briefs and appendices submitted, the panel was presented with the patent claims of the '007 patent, the patent specification, the prosecution history (including the entire file wrapper for the '007 patent)[4]

---

[4] Interestingly, appellants objected to the inclusion of the prosecution history of the '007 patent as irrelevant material and

and, to the extent provided by the parties, extrinsic evidence received by the district court. The panel, therefore, had available to it all the necessary information required by *Markham* to review and construe de novo the claim language as a matter of law. *Markham* WL 146983 at *11. To suggest – without any shred of evidence to support such an argument – that the panel failed to conduct this review, or deliberately refused to do so, demonstrates the desperation of T-O-T's position.[5]

Contrary to appellants' argument, review of the audiotape of the oral argument will indicate that the panel did review the claims de novo and did construe the meaning of the claims as a matter of law. During oral argument Judge Rader specifically indicated to appellees' counsel that the panel could make a de novo review and construe the claims at issue as a matter of law. In addition, Judge Rader raised questions concerning the specific meanings of various terms contained in the claims. Judge Rader's questioning indicates that the panel, well aware of the in

---

refused to include this highly relevant information in the Joint Appendix unless Ogontz advanced the copying costs. Ogontz agreed to advance the costs to avoid troubling this Court with additional motion practice. Even now, T-O-T still complains that the prosecution history was irrelevant, a position which is clearly frivolous in light of the holding in *Markham*, and refuses to reimburse Ogontz for inclusion of this material in the appendix as requested in Ogontz' Bill of Costs. *See* Appellant's Objections To The Bill Of Costs Of Ogontz Corporation at 3-4.

[5] Each of the judges on the panel took an oath to uphold the Constitution and the laws of the United States. It is axiomatic that a presumption exists that a merits panel of a United States court of appeals will follow the law. T-O-T has utterly failed to rebut that presumption here.

banc decision in *Markham*, followed the holding of that case and made a de novo review of the claim language and construed the claim language as a matter of law by examining the claim language itself, the specification, the prosecution history and, where helpful, the available extrinsic evidence. Moreover, the panel's unanimous decision, and the entry of a judgment of affirmance without opinion, makes clear that upon review the panel agreed that the judgement of infringement was proper and that appellants' argument was utterly without merit.

There is absolutely no evidence to support appellants' assertion that the panel overlooked or misapprehended the holding of *Markham*.[6] Indeed such a suggestion under the circumstances is outrageous.

---

[6] Appellant's counsel certifies that this appeal presents the "precedent-setting question" of whether panels of the court are obliged to apply in banc holdings of the court to pending appeals. This truly is not an issue in this appeal. As explained above, the evidence indicates the panel did apply *Markham* in the present appeal. In any case, the Federal Circuit is in agreement with the general rule that a court should apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice. *Genentech, Inc. v. Eli Lilly and Co.*, 998 F.2d 931, 944 (Fed. Cir.), *cert. denied*, 114 S. Ct. 1126 (1993). Appellant is merely attempting to manufacture an issue where none exists.

B. Appellants' Antitrust and State Law Arguments have been Argued and Reargued and are not the Proper Subject for Rehearing.

The antitrust and state law arguments in appellants' petition, similar to appellants' patent infringement argument, also present this Court with the same arguments that appellants made in the district court and before the panel on appeal. Again, in their request for yet another hearing on their state law and antitrust claims, appellants ignore the standards, provided to the parties along with the judgment order, governing petitions for rehearings of this Court's rulings, which clearly are not satisfied in the present case.

Petitions for rehearing are not to be used, as appellants attempt here, merely to "reargue matters already briefed and orally argued." I.O.P. Information Sheet. The purpose of a petition for rehearing is to point out particular points of law or fact that the court has overlooked or misapprehended in its opinion. Fed. R. App. P. 40(a). To seek a rehearing by the panel a party "must be able to identify in the court's opinion a material error of fact or law the correction of which would require a different judgment on appeal." I.O.P. Information Sheet. Therefore, the Federal Circuit usually requires that "the court must have filed an opinion in support of its judgment for a petition for rehearing to be appropriate." *Id.*

The granting of a suggestion for rehearing in banc is even more restricted. The Federal Circuit generally requires that "the merits panel entered a *precedential* opinion" before a rehearing in banc is considered appropriate. *Id.* Moreover, to justify reconsideration in banc T-O-T

must show that the merits panel failed to follow identifiable decisions of the Supreme Court of the United States or precedential opinions of the Federal Circuit. *Id.*

T-O-T has not established any of the foregoing requirements for rehearing or rehearing in banc. First, no opinion, precedential or otherwise, was filed in support of the judgment because in the panel's opinion the appellants had utterly failed to raise any issue on appeal concerning the state law and antitrust claims that required an opinion to be written. Second, T-O-T fails to identify a single controlling decision that the merits panel failed to follow. Third, appellants have identified no misapprehended points of law or overlooked facts warranting a rehearing of the state law or antitrust claims; rather, all of the legal arguments made by appellants are arguments which have already been made, repeatedly, by appellants and rejected by the District Court and this Court as meritless.

The only case cited by appellants in support of rehearing their state law claims, *Atari Games Corp. v. Nintendo of America, Inc.*, 897 F.2d 1572 (Fed. Cir. 1990), is not controlling either factually or as a matter of law, especially in light of *Professional Real Estate Investors v. Colombia Pictures,* 113 S. Ct. 1920 (1993). The issue is not whether Ogontz as a patent owner was *wholly* insulted from the antitrust laws, but rather whether Ogontz as a patent owner, a trade secrets holder and a party to a legal employment contract was immune from antitrust liability when exercising its rights under the Constitution to petition the courts for redress.

Contrary to appellants' position, the merits panel properly followed the controlling precedent of the Supreme Court, which held in *Professional Real Estate Investors v. Columbia Pictures,* 113 S.Ct. 1920 (1993), that those who petition the government for redress are generally immune from antitrust liability unless the petition is a "mere sham" to cover the attempt to interfere with competition. *Id.* at 1926. Sham litigation under the *Noerr* doctrine cannot be found where an objective view of the matter shows that a reasonable litigant could realistically expect success on the merits. *Id.* at 1928. An objectively reasonable effort to litigate cannot be a "sham" within the meaning of the exception to the *Noerr* doctrine of immunity from antitrust liability regardless of plaintiff's subjective intent. *Id.* at 1926. A winning lawsuit, such as Ogontz', is by definition a reasonable effort at petitioning for redress and, therefore, immune from antitrust liability. *Id.* at 1928 n.5.

C. An In Banc Rehearing Of Appellants' State Law Claims Would Be Wasteful Of valuable Judicial Resources.

The request of appellants that this Court grant in banc reconsideration on issues of state law represents a curious request for the allocation of judicial resources. The Third Circuit, which is presumably faced with similar requests on a regular basis, has an internal operating procedure providing that "rehearing in banc is ordinarily not granted when the only issue presented is one of state law." I.O.P. – 9.3.3 (3d Cir. 1994). This rule of the Third Circuit provides a valuable example in the present case. There is simply no reason for this court to expend its

judicial resources on an in banc rehearing of appellants' self styled "panoply of claims" to the extent they involve Pennsylvania law. Appellants' Petition for Rehearing And Suggestion For Rehearing In Banc at 13. Therefore, the petition for rehearing of the state law claims should also be denied.

III. CONCLUSION

Evidently, appellants do not believe that it is possible the panel would have ruled against them had the panel really understood the law and appellants' arguments, and believe that if they repeat their arguments enough times, eventually the panel or the court in banc will agree with them. Appellants have identified no legal basis for their entitlement to repeated bites at the same apple. Quite simply, appellants were wrong when they first made these arguments and they are still wrong.

For all the foregoing reasons, this Court should deny the petition for rehearing and suggestion for rehearing in banc.

Date: May 11, 1995

/s/ D L Overtoom
Douglas L. Overtoom
MONTGOMERY, McCRACKEN,
WALKER & RHOADS
Three Parkway, 20th Floor
Philadelphia, PA 19102
(215) 665-7200
Attorney for Appellees